

BEFORE THE
POSTAL RATE COMMISSION
WASHINGTON, D.C. 20268-0001

DOCKET SECTION

POSTAL RATE AND FEE CHANGES, 1997)

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Nov 18 4 27 PM '97
Docket No. 497-PH '97

NASHUA PHOTO INC., DISTRICT PHOTO INC.,
MYSTIC COLOR LAB, AND SEATTLE FILMWORKS, INC.

POSTAL RATE COMMISSION
OFFICE OF THE SECRETARY

MOTION TO COMPEL RESPONSE
OF UNITED STATES POSTAL SERVICE
WITNESS CHARLES L. CRUM TO NDMS INTERROGATORIES
AND MOTION TO SHORTEN RESPONSE TIME
(November 18, 1997)

Pursuant to sections 21(a) and 25(d) of the Postal Rate Commission rules of practice and Rule 2.B. of the Special Rules of Practice in this docket, Nashua Photo Inc. ("Nashua"), District Photo Inc. ("District"), Mystic Color Lab ("Mystic"), and Seattle FilmWorks, Inc. ("Seattle") (hereinafter collectively referred to as "NDMS"), proceeding jointly herein through their undersigned counsel, hereby request the Postal Rate Commission to enter an order compelling the Postal Service's witness, Charles L. Crum (USPS T-28), to respond fully to interrogatory numbers 27, 28 and 29 of the interrogatories propounded to him by NDMS in this matter (NDMS/USPS-T28-27-29), as well as numbers 30-41 (NDMS/USPS-T28-30-41) if the Postal Service lodges a similar objection to the interrogatories filed November 14, 1997.

Because of the impending hearings for oral cross-examination of Postal Service witnesses, due to commence on December 1, 1997, and the limited time within which to prepare for oral cross-examination if this motion is granted, NDMS request that the Postal Service be required to file its response to this motion within three business days after receipt, or by Friday, November 21, 1997. If this motion is granted, NDMS request that the witness be ordered to file answers to the outstanding interrogatories within three business days after the order directing a response, but no later than Friday, November 28, 1997. Such expedition is required so that NDMS will have

witness Crumm's responses before he testifies during hearings to begin, Monday, December 1, 1997.

STATEMENT OF FACTS

On November 7, 1997, NDMS filed and served by hand delivery Interrogatories and Requests to Produce T28-27, -28, and 29 to Postal Service Witness Crum. On Friday, November 14, 1997, the last possible day for objecting to the discovery, the Postal Service filed a two-page document setting forth its blanket refusal (and that of witness Crum) to respond to the NDMS discovery (and other discovery from AMMA) on the ground that "[t]he filing of these interrogatories is unauthorized." (USPS Objection, p. 1.)

The interrogatories, which have to do with the Postal Service's Library Reference H-108, were filed by NDMS pursuant to the authority Presiding Officer's Ruling R97-1/54, revising the procedural schedule herein, as well as Order No. 1200 of the Commission, issued on October 27, which provides:

Written discovery may be conducted concerning library references identified in the United States Postal Service Response to Presiding Officers Ruling No. R97-1/42, filed October 14, 1997, and any supplemental testimony provided in support of those materials.

Such authority for the NDMS discovery was confirmed in Order No. 1201 of the Commission (November 4, 1997), whereby "the library references identified in the October 14, 1997, United States Postal Response to Presiding Officer's Ruling R97-1/42" were received into evidence, and the Presiding Officer was "to schedule an additional period for written discovery on these materials." The Postal Service sought reconsideration of that Order, but it was denied. Order No. 1202, Docket No. R97-1, paras. 1-2, p. 20.

It is undisputed that Library Reference H-108 was listed in the United States Postal Service Response to Presiding Officers Ruling No. R97-1/42 (October 14, 1997), and that USPS

witness Crum was identified as the person who would sponsor that evidence. It should be undisputed, therefore, that the discovery sought by NDMS, to which the Postal Service objects, is permitted by the express terms of the Commission's Orders, Nos. 1200 and 1201.

ARGUMENT

As mentioned above, the discovery sought by NDMS has to do with the Postal Service's Library Reference H-108, identified by the Postal Service itself in its filing on October 14, 1997, and therefore is **expressly** authorized by Commission Orders 1200 and 1201.

According to the Postal Service, the NDMS interrogatories are not authorized because USPS witness Crum already testified about Library Reference H-108, which was included as Exhibit K to his testimony "in advance of his appearance on October 9, 1997" (rather than as supplemental testimony) and "witness Crum's testimony, including Exhibit K, was accepted into evidence without objection." (USPS Objection, p. 1.)

First of all, the Commission did not condition the right to take discovery on the type of nuances that the Postal Service is now trying to write into the Commission's Orders herein. The Commission ruled that the parties had the right to take discovery with respect to the library references identified in the Postal Service's filing of October 14, 1997. And the reason for this is that the Commission based its ruling regarding additional discovery on the Postal Service's "library reference litigation tactics" in this case, which have effectively deprived the parties of discovery, and prevented them from conducting discovery within the time originally allotted for discovery of the Postal Service's case.

NDMS are incredulous that the Postal Service would not only object to the discovery that is sought — after all, the Postal Service often speaks about the public interest in having all the facts before the Commission — but also to suggest that the "witness Crum's testimony, including

Exhibit K, was accepted into evidence without objection.” As the Postal Service knows well, the Commission recognized that beginning on October 8, 1997, *NDMS and other parties had a continuing objection to the entire offer of unsponsored library references. See, e.g., Tr. 4/1385, 5/2320.* Indeed, it was in the proceeding of October 9, 1997, immediately after witness Crum’s testimony had been offered and accepted as evidence, that the Presiding Officer made the following remarks:

Now, I want to go over the ground rules that we’ve been using regarding library references recently sponsored by Postal Service witnesses.

First, I have preserved a general objection for any counsel that wishes to contend that accepting these documents into evidence under the procedural circumstances of this cases that they’ve been denied due process or otherwise — that our procedures are otherwise inconsistent with acceptable administrative procedures.... **[W]e have reserved the right of counsel to object, and — and participants intend to perfect such an objection are to file written motions.** [Tr. 5/2320 (emphasis added).]

As the Postal Service knows, NDMS, which had objected to introduction of the disputed library references, beginning with their motion to strike witness Fronk’s testimony on August 29, 1997, and who had indeed objected to witness Crum’s incorporation into his testimony of the unsponsored Library Reference H-108 and had filed (on September 25, 1997) a motion to strike such testimony, did indeed perfect their continuing objection to the Postal Service’s “library reference” practices as the Presiding Officer anticipated, in their motion filed October 16, 1997.

That NDMS motion, entitled “NDMS Motion to Strike Specific Portions of the Testimony of Various Postal Service Witnesses and Certain Library References,” expressly requested that the following matter be stricken from the record:

Pages 10-12 of the direct testimony of Postal Service witness Charles L. Crum (USPS-T28), and all testimony of witness Crum on written and oral cross-examination referring to such direct testimony and/or the matters contained therein.

Such testimony includes the matter now contained in Exhibit K to witness Crum's testimony, is precisely the testimony here in issue, and was the subject of NDMS' standing objection throughout this proceeding. Indeed, it was the NDMS motion, along with two others filed on October 16, 1997, pursuant to the Presiding Officer's directive, that led to the issuance of Commission Orders 1200 and 1201. For the Postal Service to claim that NDMS did not object to the testimony of witness Crum is truly remarkable, and is flatly contradicted by the facts set forth above.

The Postal Service also claims that Order No. 1200 does not authorize the NDMS discovery because witness Crum had already testified (and Library Reference H-108 was then said to have been incorporated into his testimony) at the time Order No. 1200 was issued, thereby implying that Order No. 1200 dealt only with library references identified as evidence for the first time in the Postal Service's October 14 filing. The hypertechnical distinction that the Postal Service is attempting to draw between previously unsponsored library references is not legitimate, and finds no support in Order No. 1200. That Order allowed further discovery with respect to *all* library references identified in the Postal Service's October 14 filing. Library Reference H-108 was included in that list. The discovery is therefore authorized.

If further proof were needed, one need only look at the Presiding Officer's remarks at the hearing on October, 9, 1997. The Presiding Officer asked counsel to conduct as much oral cross-examination as they could at that time, recognizing "the possibility that a participant may request that a witness be recalled or required to provide additional written responses...." (Tr. 5/2321, ll. 6-8). The Presiding Officer expressly stated "to the extent that counsel is prepared to

explore issues now, I request that you do so, so that we can narrow the scope of the outstanding issues" (Tr. 5/2321, ll. 8-10).

Furthermore, as the Postal Service well knows, the reasons why such additional discovery is necessary, and why the questions now being asked were not asked at the time of witness Crum's testimony, include not only that NDMS had a standing objection to such testimony becoming part of the record, but also that the Postal Service's tactics prevented such discovery from taking place at an earlier time. The questions that NDMS are now asking were not asked witness Crum prior to his testimony on October 9 because, until October 1, Library Reference H-108 was simply an unsponsored library reference. Delving into these subjects prior to the Postal Service's commitment to vouch for Library Reference H-108 could have had the effect of assisting the Postal Service's "bootstrapping" effort, which was at the heart of the NDMS objections to such testimony of witness Crum in the first place.

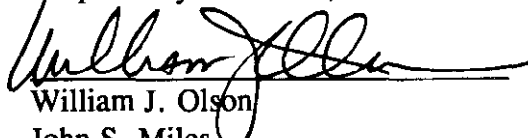
Despite months of motions practice that seems to be rooted in the Postal Service's litigation tactics, whereby library references are not designated as potential evidence, sponsorship by witnesses is expressly denied, then witnesses reverse their sworn answers to sponsor testimony, and evidence is not identified until just before it is offered, the Postal Service continues to try to deny the intervenors access to information that is relevant to the important issues in this case. Thus far, the Postal Service's litigation tactics have caused inefficiency, uncertainty, confusion, and unfairness to the intervenors, and resulted in the Commission's orders — over strong and constantly renewed protests of the Postal Service trying to justify its tactics — that the parties be given an extended period of time within which to conduct the discovery that they say they were unfairly prevented from conducting at an earlier time.

In a seemingly endless effort to deny the parties discovery, the Postal Service is attempting yet again to relitigate these questions. It should not be allowed to do so. Its statement that there was no objection to witness Crum's testimony is completely wrong, and its attempt to distinguish witness Crum from other witnesses is not legitimate. The Postal Service should be required to comply with Commission's Order Nos. 1200 and 1201, which leave no doubt that the discovery sought by NDMS is authorized.

CONCLUSION

For the foregoing reasons, NDMS request that an order be entered compelling the Postal Service's witness, Charles L. Crum (USPS T-28), to respond fully to interrogatory numbers 27, 28 and 29 of the interrogatories propounded to him by NDMS in this matter (NDMS/USPS-T28-27-29) as well as later filed interrogatories (NDMS/USPS-T28-30-41, filed November 14, 1997) that the Postal Service respond to this motion within three business days, and in no event later than November 24, 1997, and that responses be provided by the witness by November 28, 1997.

Respectfully submitted,



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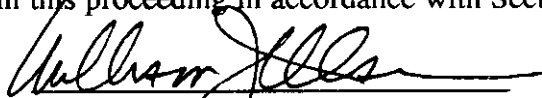
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Counsel for Nashua Photo Inc., District Photo Inc.,
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CERTIFICATE OF SERVICE

I hereby certify that I have this day served by hand delivery or mail the foregoing document upon all participants of record in this proceeding in accordance with Section 12 of the Rules of Practice.


William J. Olson

November 18, 1997